Supreme Court, U.S.
FILED

932072 MAY 27 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

BILTMORE SQUARE ASSOCIATES, ET AL.,

Petitioners,

v.

CITY OF ASHEVILLE,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

MARTIN REIDINGER
Counsel of Record
ADAMS HENDON CARSON
CROW & SAENGER, PA
P.O. Box 2714
Asheville, NC 28802
(704) 252-7381

S. JEROME CROW
ADAMS HENDON CARSON
CROW & SAENGER, PA
P.O. Box 2714
Asheville, NC 28802
(704) 252-7381

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether property owners within an area which is the subject of an involuntary municipal annexation (annexation area) have standing to challenge the ordinance of annexation in question for its violation of the Voting Rights Act of 1965 in an instance where the annexation of the virtually all white population of the annexation area has the effect of diluting minority voting strength within the municipality.

PARTIES TO THE PROCEEDING

The petitioners are Biltmore Square Associates, a North Carolina joint venture; DeBartolo Asheville Associates, an Ohio general partnership; Seven Seas Partnership, a North Carolina general partnership; Crown American Corporation, a Pennsylvania Corporation; Proffitt's Inc., a Tennessee Corporation; Ray Bridges and wife Deborah Bridges; Wesley Angel and wife Gwenda Angel; Paul Martin Jones and wife Mary Sue Jones, who were all original petitioners below. Of these petitioners, Crown American Corporation has been merged into Crown American Associates, a Pennsylvania Business Trust, which has as its parent corporation Crown Delaware Holding Company, a Delaware Corporation. No other petitioner has a parent corporation or non-wholly owned subsidiary.

The respondent, who was also respondent below, is the City of Asheville, North Carolina, a municipal corporation existing under the laws of the State of North Carolina.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinions below 2

Jurisdiction 2

Statutory provisions involved 2

Statement 2

Reasons for granting the petition 5

Conclusion 9

Appendix A ..... App. 1

Appendix B ..... App. 13

Appendix C ..... App. 17

Appendix D ..... App. 21

Appendix E ..... App. 24

Appendix F ..... App. 26

Appendix G ..... App. 29

Appendix H ..... App. 31

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Education, 393 U.S. 544 (1969) 6

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962)..... 6

Dotson v. City of Indianola, 514 F.Supp. 397 (N.D. Miss. 1981)..... 4

Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967)..... 3, 7

Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L.Ed.2d 169 (1966)..... 5

Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 38 (1982)..... 4, 6

Newman v. Voinovich, 789 F. Supp. 1410 (S.D. Ohio 1992), aff'd 986 F.2d 159 (6th Cir. 1993), cert. denied ___ U.S. ___, 113 S.Ct. 3041 (1993)..... 7

Town of Pleasant Grove v. United States, 479 U.S. 462, 93 L.Ed.2d 866 (1987)..... 6

City of Rome v. United States, 446 U.S. 156, 64 L.Ed.2d 119 (1980)..... 6

Valley Forge Christian College v. Americans for Separation of Church and State, Inc., 454 U.S. 464 (1982)..... 7

Yick Woo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220 (1886)..... 5

STATUTES:

42 U.S.C. §1973..... 2

N.C. Gen. Stat. §160A-45 *et seq*..... 3

N.C. Gen. Stat. §160A-49..... 3

N.C. Gen. Stat. §160A-50..... 3, 4

No. _____

In The

Supreme Court of the United States

October Term, 1993

BILTMORE SQUARE ASSOCIATES, ET AL.,

Petitioners,

v.

CITY OF ASHEVILLE,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

NOW COME Biltmore Square Associates, a North Carolina joint venture; DeBartolo Asheville Associates, an Ohio general partnership; Seven Seas partnership, a North Carolina general partnership; Crown American Corporation, a Pennsylvania Corporation; Proffitt's Inc., a Tennessee Corporation; Ray Bridges and wife Deborah Bridges; Wesley Angel and wife Gwenda Angel; Paul Martin Jones and wife Mary Sue Jones by and through the undersigned counsel, and petition for a writ of certiorari to review the judgment of the North Carolina Court of Appeals in this case.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals (App. 1) is reported in 113 N.C. App. 459, 439 S.E.2d 211. The opinion of the Superior Court Division of the North Carolina General Court of Justice is by written order (App. 13) and is unreported.

JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on February 1, 1994. A petition for rehearing was denied on March 3, 1994 (App. 24). A petition for discretionary review to the Supreme Court of North Carolina was denied on May 5, 1994 (App. 26). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Voting Rights Act of 1965, 42 U.S.C. §1973, are set forth in the appendix (App. 29), as are the relevant portions of the North Carolina involuntary annexation statute N.C. Gen. Stat. §160A-48 through 50 (App. 31).

STATEMENT

1. North Carolina law allows for a municipality to annex areas adjacent to its limits without the consent of the residents of the area to be annexed (hereinafter

"involuntary annexation"). N.C. Gen. Stat. §160A-45 et seq. This action is undertaken by vote of the governing body of the municipality (herein the City Counsel of the City of Asheville). N.C. Gen. Stat. §160A-49.

Such an ordinance of annexation becomes effective unless it is challenged by a statutory judicial proceeding pursuant to N.C. Gen. Stat. §160A-50, as was brought herein.

2. In this case, the City of Asheville, North Carolina adopted an ordinance of annexation to involuntarily annex an area known as the Brevard Road Corridor (hereinafter the "annexation area"). The residents of the annexation area are virtually all white. Only three registered voters residing in the annexation area are members of any racial minority. The population of the annexation area was 538 persons. This annexation, therefore, has the clear effect of diluting the minority voting strength within the city in violation of Section 2 of the Voting Rights Act. (The annexation area is not in a pre-clearance jurisdiction under Section 5 of the Act.)

3. This annexation, and the fact that it violates the Voting Rights Act, would directly harm the petitioners. It has been held by the North Carolina courts that the validity of an involuntary annexation can be challenged only through the statutory proceeding under N.C. Gen. State. §160A-50. *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967). For that reason, if an annexation violates the Voting Rights Act, but is not challenged by this proceeding, then the annexation becomes effective, and the residents are taxed. *Moore v. Swinson*, 58 N.C. App.

714, 294 S.E.2d 38 (1982). *See, also, Dotson v. City of Indianola,* 514 F.Supp. 397 (N.D. Miss. 1981). However, by virtue of the violation of federal voting laws, these same residents can be denied their franchise as voters and as candidates for office. *Moore,* supra. *See, also, Dotson,* supra.

In this way the petitioners can be annexed into the city, and taxed and regulated, but will not be afforded full citizenship in this city. In short, the petitioners will be harmed because they will suffer taxation without representation if this annexation is allowed to become effective.

4. The petitioners, in filing this action pursuant to N.C. Gen. State. §160A-50, raised the issue that the annexation is invalid because it violates the Voting Rights Act of 1965, 42 U.S.C. §1973 et seq. It violates the Voting Rights Act by diluting the minority voting strength in the municipality (Excerpts of petition below, App. 17).

The city responded to the challenge based on the violation of the Voting Rights Act by claiming that these petitioners do not have standing to assert that the annexation violates the Voting Rights Act. The city argued below that only voters within the city who are members of racial minorities have such standing. (No Answer is required from the city under N.C. Gen. Stat. §160A-50. Therefore the denial of the petitioners' standing was first raised by the city in closing argument at trial. Such closing argument was not recorded, but the issue was disposed of by the trial court in its judgment. App. 14).

5. The trial court concluded, without discussion, that the petitioners do not have standing to raise the violation of the Voting Rights Act (App. 14). The petitioners assigned error to the ruling that they do not have standing, and appealed to the North Carolina Court of Appeals (App. 22). The North Carolina Court of Appeals affirmed, simply stating that "We find that petitioners have failed to show that they were asserting their own rights and interests and not those of third parties." (App. 9).

6. A petition for rehearing to the North Carolina Court of Appeals was denied (App. 25). The Supreme Court of North Carolina denied a petition for discretionary review (App. 28).

REASONS FOR GRANTING THE PETITION

The North Carolina Court of Appeals held that persons who are being involuntarily annexed by a municipality who stand to lose their franchise by virtue of that annexation violating the Voting Rights Act do not have standing to challenge the annexation. This ruling is at variance with decisions in the circuit courts regarding the definition of standing under the Voting Rights Act, and serves to leave the petitioners with a right but no remedy.

1. Few rights in American society are held to be so precious as the right to vote. It is a "fundamental right because [it is] preservative of all rights." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667, 16 L.Ed.2d 169, 172 (1966) (quoting *Yick Woo v. Hopkins*, 118 U.S. 356, 370, 30

L.Ed. 220, 226 (1886)). *See also, Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962).

It is the importance of the right to vote that gave rise to the Voting Rights Act of 1965. It applies to municipal annexations, *Town of Pleasant Grove v. United States*, 479 U.S. 462, 93 L.Ed.2d 866 (1987), just as it does to any state or municipal act that affects voting. The annexation in question in this action violates the Voting Rights Act of 1965. By annexing an area that has an all white population, this annexation serves to dilute the voting strength of minority groups within the city. *See Town of Pleasant Grove*, supra; *City of Rome v. United States*, 446 U.S. 156, 64 L.Ed.2d 119 (1980); *Allen v. State Board of Education*, 393 U.S. 544 (1969).

2. Even though the right to vote is fundamental, the Petitioners stand to lose it. They stand to lose it *because* the annexation violates the Voting Rights Act. In order to protect their rights, the petitioners herein must have standing to challenge the violation imposed by this annexation ordinance.

If this annexation goes into effect, the Petitioners will be taxed and regulated as residents of the City, but they can be deprived of their voting rights in city elections. *Moore v. Swinson*, 58 N.C. App. 714, 294 S.E.2d 38 (1982). Furthermore, they can be deprived of any participation in the electoral process as candidates. *Id.* In other words, this annexation can serve to render the Petitioners to be citizens without any franchise. Taxation without representation; that is the result.

Once the annexation goes into effect, the harm is done. The residents will be taxed and regulated, and their

vote is in jeopardy. The Petitioners can only protect their interests by raising the Voting Rights Act issue in a challenge to the effectiveness of the ordinance itself. The ordinance can *only* be challenged in an action (such as this one) pursuant to N.C. Gen. Stat. 160A-50. *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967). Therefore, the Petitioners can *only* be protected from this potential harm if they have standing *in this action* to assert the position that the ordinance violates the Voting Rights Act.

3.a. The Court of Appeals held that "the Petitioners have failed to show that they were asserting their own rights and interests and not those of third parties." (App. 9). The Petitioners are seeking to prevent the loss of THEIR OWN right to vote. They are seeking to prevent THEIR OWN taxation without representation.

The Judgment of the Court of Appeals is, in substance, that the Petitioners have lost nothing by being potentially deprived of their franchise.

b. The Court of Appeals employed in its decision the analysis of standing as expressed by this Court in *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). This analysis has been applied by other courts in determining standing under the Voting Rights Act. *Newman v. Voinovich*, 789 F. Supp. 1410 (S.D. Ohio 1992), aff'd 986 F.2d 159 (6th Cir. 1993), cert. denied ___ U.S. ___, 113 S.Ct. 3041 (1993). The *Valley Forge* test consist of a six prong analysis of whether a petitioner has the standing to bring an action under a given federal law. The Court of Appeals held that only one of these was lacking in this case, that being the fourth element, which reads "the plaintiff must assert his own

legal rights and interest, not those of a third party." *Id.* at 1415.

It is, however, the petitioners' own rights that they seek to protect in challenging this ordinance for its violation of the Voting Rights Act. It is THEIR OWN right to vote that is in jeopardy.

It appears particularly ironic that the Court of Appeals has ruled that these petitioners do not have standing to protect their own voting rights from the impact of an ordinance that would deprive them of their voting rights BY VIRTUE OF ITS VIOLATION OF THE VOTING RIGHTS ACT.

4. The ultimate effect of the ruling of the Court of Appeals should also be noted. It should allow any municipality of act in purposeful violation of the Voting Rights Act without suffering repercussions. It will serve to create the "politically safe annexation." A city could involuntarily annex an area, and by purposely creating the area so as to have the annexation violate the Voting Rights Act, the City could then cause the residents of the area to be barred from participating in the electoral process of the City. Thus the Council members who participate in the annexation are never accountable to those whom they annex.

The effect of the Court of Appeals decision is that the Voting Rights Act can be used as a weapon to disenfranchise. One of the most important federal laws enacted to protect the right to vote will have been rendered a means by which to take away the right to vote, for the political advantage of those doing the taking! This can only be done if those harmed by such action do not have

standing to raise the violation of the Voting Rights Act. For this reason, the petitioners herein must have standing to be able to challenge the ordinance for its violation of the Voting Rights Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAMS HENDON CARSON CROW & SAENGER PA

by /s/ Martin Reidinger
MARTIN REIDINGER

by /s/ S. Jerome Crow
S. JEROME CROW
Counsel for Petitioners
P.O. Box 2714
Asheville, NC 28802
(704) 252-7381

June 1994

APPENDIX A

No. 9228SC814

NORTH CAROLINA COURT OF APPEALS

Filed: 1 February 1994

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DeBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, SEVEN SEAS PARTNERSHIP, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, Proffitt's Inc., a Tennessee Corporation, RAY BRIDGES and wife, DEBORAH BRIDGES, WESLEY ANGEL and wife, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES and wife, MARY SUE JONES, Petitioners

v.

CITY OF ASHEVILLE, a Municipal Corporation, Respondent

Buncombe County No. 91 CVS 2369

(Filed Feb. 1, 1994)

Appeal by petitioners from judgment entered 10 March 1992 by Judge Robert W. Kirby in Buncombe County Superior Court. Heard in the Court of Appeals 16 June 1993.

Adams Hendon Carson Crow & Saenger, P.A., by S. J. Crow and Martin Reidinger, for petitioner appellants.

Nesbitt & Slawter, by William F. Slawter; and Assistant City Attorney Sarah Patterson Brison, for respondent appellee.

COZORT, Judge.

On 4 June 1991, the Asheville City Council adopted Ordinance No. 1911 which annexed a certain area of land southwest of the City. On 3 July 1991, petitioners filed a petition for judicial review of the annexation ordinance, alleging, in pertinent part that (1) petitioners are owners of real property located in the annexation area; (2) all annexation proceedings are invalid and that Ordinance 1911 is void because incorporation of the annexation area violates the Voting Rights Act of 1965; (3) the City failed to meet the requirements of N.C. Gen. Stat. §§ 160A-47, 160A-48, and 160A-49 (1987); (4) the ordinance was not adopted in accordance with procedures of the City Council; (5) petitioners were not given proper notice and were deprived of due process of law; and (6) the annexation statutes as applied deprived petitioners of due process of law, equal protection, and benefits of law of the land. Petitioners asked the court to declare that the ordinance was void and that the area purported to be annexed was not eligible for annexation. They also requested a remand for proceedings in accordance with annexation statutes, costs of the action, and other relief.

On 10 March 1992, Superior Court Judge Robert W. Kirby found, in pertinent part:

Voting Rights Act

3. Petitioners in this matter include two general partnerships involved in a joint venture, with one of the partnerships being an Ohio General Partnership; a Pennsylvania corporation; a Tennessee corporation; and seven individual petitioners. All of the individual petitioners are white. None of the individual petitioners were registered to vote within the City of Asheville at the time of this annexation.

* * *

Subdivision Test

* * * *

11. Respondent performed calculations for the subdivision test prior to approval by the Asheville City Council of the report setting forth plans to provide for extension of major municipal services to the Annexation Area (the "Plan"). The Plan was approved on March 19, 1991.

12. The Plan approved on March 19, 1991, included a statement showing that the Annexation Area is developed for urban purposes as defined in *N.C. Gen. Stat.* sec. 160A-48 (c) (3). The Plan showed that of the 363.90 acres of land in the Annexation Area not used for commercial, industrial, governmental or institutional purposes, 262.25 acres, or 72.07%, are divided into lots and tracts of five acres or less.

13. Property owners in the Annexation Area caused changes to be made to the Buncombe County tax maps and records after

the Plan was adopted on March 19, 1991, but before City of Asheville Ordinance No. 1911 ("Annexation Ordinance") was adopted on June 4, 1991. The parties stipulated that those changes were made on May 6 and 7, 1991.

* * * *

16. The public hearing on the Annexation Area was held on April 23, 1991.

17. The Annexation Ordinance was adopted on three readings – May 7, 1991; May 21, 1991; and June 4, 1991. The effective date of the annexation, as established by the Annexation Ordinance, was July 31, 1991. The effective date of the annexation was stayed, however, by the filing of a petition in this matter on July 3, 1991.

18. Respondent made changes to the boundaries of the Annexation Area by deleting some lots and tracts at the southern end of the area described in the resolution of intent after the approval of the Plan and before the adoption of the Annexation Ordinance. Those changes were reflected in the second paragraph of subsection (2) of the "Statement of Statutory Standards" found on pages 1 and 2 of the Amendment to the Plan for Extension of Major Municipal Services approved on June 4, 1991 ("Amended Plan"). In addition, Respondent showed the addition of one lot within the Annexation Area which was inadvertently omitted from calculations made prior to adoption of the Plan.

19. At the trial of this matter, Respondent conceded that it had made an 18.0 acre error in its subdivision test calculations. As a result of that error the subdivision test calculation in paragraph 2 of subsection (2) of the "Statement of Statutory Standards" should be changed to show that of the 360.45 acres of land in the Annexation Area not used for commercial, industrial, governmental or institutional purposes, 240.80 acres, or 66.81%, are divided into lots and tracts of five acres or less.

20. The General Assembly has determined that certain steps must be taken in the annexation process and those procedural steps require that there be a cutoff date for determining what changes had been made to lots and tracts for the purposes of the subdivision test in *N.C. Gen. Stat.* sec. 160A-48 (c) (3). That date can be no later than the date of the public hearing, at which time the public has ample opportunity to provide cities in North Carolina with information as to incorrect use or size determinations for the purposes of that test.

21. Respondent's calculations of the subdivision test as set forth in paragraph 2, with the revision for the 18 acre error, are the calculations to be used as of the "time of annexation."

22. At the time of annexation, therefore, the Annexation Area was subdivided into lots and tracts such that 68.81% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional

purposes, consisted of lots and tracts five acres or less in size.

23. Respondent included in paragraphs 3 and 4 of subsection (2) of the "Statement of Statutory Standards" calculations which would result if one did take into consideration actions taken by various property owners within the Annexation Area following adoption of the Plan (and after the public hearing), by which they caused changes to be made to the size and number of lots shown on the Buncombe County tax maps and records. Respondent also included in paragraph 4 changes in use to an 18.0 acre tract and a 6.1 acre tract which occurred following the approval of the Plan.

Based upon the findings of fact, the trial court concluded in part:

2. This Court does not have jurisdiction in this proceeding to determine whether or not this annexation results in a violation of the Voting Rights Act of 1965, as amended.

3. Even if this Court had such jurisdiction, Petitioners herein do not have standing in this proceeding to challenge this annexation as violating the Voting Rights Act of 1965, as amended.

4. Even if this Court had such jurisdiction and Petitioners had such standing, Petitioners have failed to show that this annexation violates the Voting Rights Act of 1965, as amended.

5. The Annexation Area complies with the provisions of *N.C. Gen. Stat.* sec. 160A-48

> (c) (3) in that it was subdivided into lots or tracts such that at least 60% of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.
>
> 6. The Annexation Area substantially complies with the coincidence requirements of *N.C. Gen. Stat.* sec. 160A-48 (b) (2).

The trial court affirmed the annexation ordinance. Petitioners appeal.

On appeal, petitioners argue that the trial court erred in (1) finding and concluding that Ordinance 1911 did not violate the Voting Rights Act; (2) concluding that it did not have jurisdiction to decide a challenge to the ordinance based on the Voting Rights Act; (3) concluding that petitioners did not have standing to challenge the ordinance based on a violation of the Voting Rights Act; and (4) finding and concluding that the annexation area met the requirements of N.C. Gen. Stat. § 160A-48 (c) (3).

We first consider whether petitioners have standing to challenge the annexation on the basis that the ordinance violated the Voting Rights Act. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (a) (Cum. Supp. 1993), provides in part that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

Our research revealed no North Carolina cases addressing the requirement of standing to challenge an ordinance on the basis of the Voting Rights Act. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues. . . . ' " *Stanley v. Dept. Conserv. & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961 (1968)). We turn to federal cases for further guidance. To establish standing under the Voting Rights Act, petitioner must show:

> (1) he has personally suffered or will suffer some distinct injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to defendant's conduct; (3) the injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests, not those of a third party; (5) the injury must consist of more than a generalized grievance that is shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question.

Newman v. Voinovich, 789 F. Supp. 1410, 1415 (S.D. Ohio 1992) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-77, 70 L.Ed.2d 700, 709 (1982)), *aff'd*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 125 L.Ed. 2d 727 (1993). Petitioners alleged that the annexation in violation of the Voting Rights Act "could dilute the minority voting strength within the existing City boundary and that

therefor the citizens of this annexation area . . . could be deprived of the full benefit of their rights as citizens of the City of Asheville if annexed. . . . " We find that petitioners have failed to show that they were asserting their own legal rights and interests and not those of third parties. The parties stipulated that none of the petitioners is a member of a racial or ethnic minority and that none of the petitioners were registered to vote within the City of Asheville. The annexation does not deny or abridge the right to vote on account of petitioners' race or color. Accordingly, we find that the trial court did not err in concluding that the petitioners did not have standing to challenge the annexation proceeding as violating the Voting Rights Act. We need not address petitioners' remaining arguments based upon a violation of the Voting Rights Act.

We next consider petitioners' argument that the trial court erred in concluded that the annexation area met the standards of the subdivision test set forth in N.C. Gen. Stat. § 160A-48(c)(3) (1987). The parties stipulated that the use test required by N.C. Gen. Stat. § 160A-48(c)(3) has been met. N.C. Gen. Stat. § 160A-48 provides in part:

> (a) A municipal governing board may extend the municipal corporate limits to include any area
>
> (1) Which meets the general standards of subsection (b), and
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> * * * *

> (c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> * * * *
>
> (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at *the time of annexation* for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size. (Emphasis added.)

N.C. Gen Stat. § 160A-49(e)(1) requires an ordinance to contain specific findings that the area to be annexed meets the requirements of N.C. Gen. Stat. § 160A-48. Throughout the annexation process, the percentages for the subdivision tests changed to reflect updated findings, changes in tax records, and changes in the character of property. As a result, Ordinance No. 1911 contains four different paragraphs concerning the subdivision test with each paragraph showing calculations based upon different data. The Ordinance states that all four paragraphs reflect numbers above the threshold sixty percent. At trial, however, the City conceded that an eighteen-acre error had been made which changed the subdivision test percentages. Although percentages set forth in the first,

second, and fourth paragraphs remained above sixty percent, the percentage in the third paragraph did not. The trial court found that the termination date for calculation of the subdivision test percentage could be no later than the date of the public hearing. Accordingly, the trial court found that the second paragraph satisfied the requirements of N.C. Gen. Stat. § 16A-48(c)(3).

Petitioners argue on appeal that the annexation was improper because the trial court erred in relying upon the calculations in the second paragraph reflecting the subdivision test percentage *four months before the adoption of the ordinance.* Petitioners argue that the trial court misinterpreted the phrase "time of annexation." The phrase, petitioners contend, means the time of the adoption of the annexation ordinance, not the time of the public hearing. Therefore, petitioners argue, the trial court should have considered the percentage in the third paragraph, which did not satisfy the requirements of N.C. Gen. Stat. § 160A-48(c)(3).

Reviewing the statutory scheme, we agree with the trial court that the date of the public hearing is the latest appropriate cutoff date for determining the subdivision test percentages. As found by the trial court, the legislature has created procedural steps in the annexation scheme which require certainty. The City argues persuasively that if "time of annexation" means time of adoption of the ordinance, then landowners could thwart the annexation process indefinitely by making changes on the day the City Council is scheduled to vote on the adoption of the ordinance. Therefore, we find the trial court did not err in finding that the provisions of N.C.

Gen. Stat. § 160A-48(c)(3) were met in paragraph 2 of subsection (2) of the Statement of Statutory Standards.

Affirmed.

Chief Judge ARNOLD and Judge MARTIN concur.

APPENDIX B

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 91 CVS 2369
BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, et al., Petitioners, vs. CITY OF ASHEVILLE, a municipal corporation, Respondent.	JUDGMENT (Filed Mar. 10, 1992)

THIS CAUSE coming on to be heard before the undersigned Judge Presiding in a non-jury trial during the January 13, 1992, Regular Session of Civil Superior Court in Buncombe County, pursuant to *N.C. Gen. Stat.* sec. 160A-50, and the Court having heard and considered the testimony and documentary evidence presented and the stipulations of the parties, and having considered the arguments presented by Counsel for the parties, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

JURISDICTION

1. Petitioners are the owners of real property located in the area which is subject of the annexation proceeding in question.

2. The Respondent City of Asheville is a municipal corporation organized and existing under the laws of the State of North Carolina and at all times relevant herein was a city in excess of 5,000 persons in population.

Voting Rights Act

3. Petitioners in this matter include two general partnerships involved in a joint venture, with one of the partnerships being an Ohio General Partnership; a Pennsylvania corporation; a Tennessee corporation; and seven individual petitioners. All of the individual petitioners are white. None of the individual petitioners were registered to vote within the City of Asheville at the time of this annexation.

4. Petitioners have offered evidence as to minority population and voting registration statistics for the City of Asheville and for two precincts outside of the City of Asheville, which include the annexation area which is the subject of this proceeding ("Annexation Area").

5. Petitioners have not shown that a minority group is sufficiently large and geographically compact to constitute a majority in a single member district within the corporate limits of the City of Asheville, when excluding or including the Annexation Area.

6. Petitioners have offered no evidence to show that a minority group is politically cohesive.

7. Petitioners have offered no evidence to show that the white majority vote sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat a minority group's preferred candidate.

* * *

CONCLUSIONS OF LAW

1. *N.C. Gen. Stat.* sec. 160A-50 (f) sets forth the scope of review in an annexation proceeding and judicial review is limited in scope by that statutory provision.

2. This Court does not have jurisdiction in this proceeding to determine whether or not this annexation results in a violation of the Voting Rights Act of 1965, as amended.

3. Even if this Court had such jurisdiction, Petitioners herein do not have standing in this proceeding to challenge this annexation as violating the Voting Rights Act of 1965, as amended.

4. Even if this Court had such jurisdiction and Petitioners had such standing, Petitioners have failed to show that this annexation violates the Voting Rights Act of 1965, as amended.

* * *

IT IS THEREFORE, ADJUDGED, ORDERED AND DECREED that Ordinance No. 1911 of the Respondent City of Asheville be and is hereby affirmed without

change. The cost of this proceeding shall be borne by the Petitioners.

This the 10th day of February, 1992.

/s/ Robert W. Kirby
Superior Court Judge Presiding

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CVS ___

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DeBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, SEVEN SEAS PARTNERSHIP, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, PROFFITT'S, INC., a Tennessee Corporation, RAY BRIDGES and wife, DEBORAH BRIDGES, WESLEY ANGEL and wife, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES and wife, MARY SUE JONES,

Petitioners,

vs.

CITY OF ASHEVILLE, a Municipal Corporation,

Respondent.

PETITION FOR REVIEW OF ANNEXATION ORDINANCE

(Filed July 3, 1991)

The Petitioners herein, in apt time and pursuant to the provisions of N.C. Gen. Stat. § 160A-50, hereby file and present this Petition for Review of and pray this Court to review the actions of the City Council of the City of Asheville, a municipal corporation, located in Buncombe county, North Carolina, in adopting an ordinance on June 4, 1991, (hereinafter "Ordinance No. 1911") which, in accordance with its terms, is to be effective from and after July 31, 1991, which ordinance purports to annex lands, including the lands and property owned by or belonging to the Petitioners and to each of them, and the Petitioners and each of them believe that they will suffer material injury by reason of such ordinance and annexation, and by reason of the failure of the City of Asheville and its municipal governing board to comply with the procedures set forth in the North Carolina General Statutes Chapter 160A, Article 4A, Part 3, and the Constitutions of the State of North Carolina and the United States of America as the same apply to the area purported to be annexed and the property of each of the Petitioners, and by reason of the failure of the area purported to be annexed and parts thereof to meet the requirements of N.C. Gen. Stat. § 160A-48, and in support thereof the Petitioners show the Court as follows:

* * *

7. The Petitioners are advised, informed and believe that all of the annexation proceedings involved in this matter are invalid and that Ordinance No. 1911 is void in that the Respondent City and the annexation proceedings as a whole are deficient in the following particulars:

* * *

(d) That the incorporation of the annexation area described in Ordinance No. 1911 into the City of Asheville is contrary to the Voting Rights Act of 1965 and that such annexation could dilute the minority voting strength within the existing City boundary and that therefore the citizens of this annexation area, through actions uncontrolled and uncontrollable by them, could be deprived of the full benefit of their rights as citizens of the City of Asheville if annexed and that therefore Ordinance No. 1911 is invalid as violating the Voting Rights Act of 1965 and the equal protection clause of the United States Constitution and the North Carolina Constitution.

* * *

14. The Petitioners further allege that the annexation statutes of the State of North Carolina, specifically Chapter 160A, Article 4A, Part 3, as applied in this matter fail to provide to the Petitioners the due process of law, equal protection of the law, and the benefits of the law of the land guaranteed to them by Article 1, Section 19 of the Constitution of the State of North Carolina and the 14th Amendment of the Constitution of the United States.

WHEREFORE, the Petitioners respectfully pray the Court as follows:

1. To declare Ordinance No. 1911 of the Respondent City of Asheville and all proceedings in connection therewith to be null and void and of no effect;
2. To declare the area purported to be annexed not eligible for annexation by the City of Asheville;

3. In the alternative, to remand these proceedings in accordance with the law specifically required in compliance with Part 3 of Article 4A of Chapter 160A of the North Carolina General Statutes;
4. That the costs of this action be taxed against the Respondent; and
5. For such other and further relief as this Court may deem just and proper.

This the 3rd day of July, 1991.

ADAMS HENDON CARSON
CROW & SAENGER, P.A.

By: /s/ Martin Reidinger
S.J. CROW
MARTIN K. REIDINGER
Attorneys for Petitioners
Post Office Box 2714
Asheville, NC 28802
(704) 252-7381

APPENDIX D

NO. 9228SC814

TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DeBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, SEVEN SEAS PARTNERSHIP, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, PROFFITT'S, INC., a Tennessee Corporation, RAY BRIDGES and wife, DEBORAH BRIDGES, WESLEY ANGEL and wife, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES and wife, MARY SUE JONES, Petitioners, vs. CITY OF ASHEVILLE, a Municipal Corporation, Respondent.	From Buncombe County 91 CvS 2369

Before the Honorable Robert W. Kirby, Judge Presiding at the January 13, 1992 Civil Term of Superior Court, Twenty-eighth Judicial District, Buncombe County, North Carolina, heard without a jury. Written Judgment appealed from was rendered out of session pursuant to stipulation of the parties, and was entered on March 10, 1992. The Petitioners appealed from said Judgment by filing written Notice of Appeal with the Buncombe County Clerk of Superior Court and by serving a copy thereof on the Respondent on April 7, 1992.

(This Record has been filed and docketed in the North Carolina Court of Appeals on August 11, 1992.)

* * *

Record, p.310 (J p.7)

53. The Court's Conclusion of Law No. 2 in that there is insufficient evidence to support it, there are insufficient findings of fact to support it, it is contrary to the law, and constitutes a misapplication of the law.

Record, p.319 (J p.7)

54. The Court's Conclusion of Law No. 3 in that there is insufficient evidence to support it, there are insufficient findings of fact to support it, it is contrary to the law, and constitutes a misapplication of the law.

Record, p.320 (J p.8)

55. The Court's Conclusion of Law No. 4 in that there is insufficient evidence to support it, there are insufficient findings of fact to support it, it is contrary to the law, and constitutes a misapplication of the law.

Record, p.320 (J p.8)

* * *

61. The Court's findings conclusions and actions in affirming without change the Respondent City's Annexation procedures, in that the same is unsupported by the law, and there is insufficient evidence to support it, and there are insufficient findings of fact to support the same.

Record, p.313-20 (J p.1-8)

62. The Court's signing and entry of the Judgment in that the same is unsupported by the law, and there is insufficient evidence to support it, and there are insufficient findings of fact to support the same.

Record, p.313-20 (J p.1-8)

APPENDIX E

NO. 9228SC814

NORTH CAROLINA COURT OF APPEALS

****

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DEBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, PROFFITT's INC., a Tennessee Corporation, RAY BRIDGES AND WIFE, DEBORAH BRIDGES, WESLEY ANGEL AND WIFE, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES AND WIFE, MARY SUE JONES,
Petitioners,

v

CITY OF ASHEVILLE, a Municipal Corporation,
Respondent

COUNTY:
Buncombe

NUMBER:
91CVS2369

(Filed
Mar. 3, 1994)

****

ORDER

The following Order was entered:

"The petition filed in this cause on the 1st day of March, 1994 and designated "Petitioner For Rehearing" is denied.

By order of the Court this 3rd day of March, 1994."

The above order is therefore certified to the Clerk of Superior Court in Buncombe County, North Carolina.

Witness my hand and official seal this the 3rd day of March, 1994.

/s/ John H. Connell
Clerk of the Court of Appeals

Orig CSC
cc: S. Jerome Crow
Martin K. Reidinger
Sarah Patterson Brison
William F. Slawter

APPENDIX F

No. 143P94

TWENTY-EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DeBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, SEVEN SEAS PARTNERSHIP, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, PROFFITT'S, INC., a Tennessee Corporation, RAY BRIDGES and wife, DEBORAH BRIDGES, WESLEY ANGEL and wife, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES and wife, MARY SUE JONES	)	From NC Court of Appeals (922b8C814) From Buncombe (91CVS2369)
v	)	
CITY OF ASHEVILLE, a Municipal Corporation	)	

ORDER

(Filed May 5, 1994)

Upon consideration of the petition filed by Several Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant

to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th day of May 1994.

/s/ Parker, J.
For the Court"

NO: 9228SC814

NORTH CAROLINA COURT OF APPEALS

****

BILTMORE SQUARE ASSOCIATES, a North Carolina Joint Venture, DeBARTOLO ASHEVILLE ASSOCIATES, an Ohio General Partnership, SEVEN SEAS PARTNERSHIP, a North Carolina General Partnership, CROWN AMERICAN CORPORATION, a Pennsylvania Corporation, HESS'S DEPARTMENT STORES, INC., a Pennsylvania Corporation, PROFFITT'S, INC., a Tennessee Corporation, RAY BRIDGES and wife, DEBORAH BRIDGES, WESLEY ANGEL and wife, GWENDA ANGEL, BRENT WILLIAMSON, PAUL MARTIN JONES and wife, MARY SUE JONES

V

CITY OF ASHEVILLE, a Municipal Corporation

COUNTY: BUNCOMBE NUMBER: 91CVS2369 (Filed May 10, 1994)

****

Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on 1 February 1994 was denied by order of the North Carolina Supreme Court on the 5th day of May, 1994, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Buncombe County North Carolina that the North Carolina Supreme Court has denied the Petition for Discretionary Review filed by the Several Plaintiffs in this cause.

Witness my hand and official seal this the 10th day of May, 1994.

/s/ John H. Connell
Clerk of the Court of Appeals
/s/ Kathy Taylor
Deputy Clerk
Court of Appeals

CSC Orig.
XC: Mr. S. Jerome Crow
Mr. Martin K. Reidinger
Ms. Sarah Patterson Brison
Mr. William F. Slawter

APPENDIX G

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Aug. 6, 1965, P. L. 89-110, Title I, § 2, 79 Stat. 437; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P. L. 94-73, Title II, § 206, 89 Stat. 402; June 29, 1982, P. L. 97-205, § 3, 96 Stat. 134.)

* * *

APPENDIX H

§ 160A-48. Character of area to be annexed.

(a) A municipal governing board may extend the municipal corporate limits to include any area

(1) Which meets the general standards of subsection (b), and

(2) Every part of which meets the requirements of either subsection (c) or subsection (d).

(b) The total area to be annexed must meet the following standards:

(1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.

(2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

(3) No part of the area shall be included within the boundary of another incorporated municipality.

(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

(1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at

least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty-percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

(e) In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge liens and streams and creeks as boundaries, and may use streets as boundaries. (1959, c. 1009, s. 4; 1973, c. 426, s. 74; 1983, c. 636, s. 15; 1985, c. 757, s. 205(d).)

* * *

---

§ 160A-49. Procedure for annexation.

(a) Notice of Intent. – Any municipal governing board desiring to annex territory under the provisions of this Part shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries of the area under consideration and fix a date for a public hearing on the question of annexation, the date for such public hearing to be not less than 45 days and not more than 90 days following passage of the resolution.

(b) Notice of Public Hearing. – The notice of public hearing shall:

(1) Fix the date, hour and place of the public hearing.

(2) Describe clearly the boundaries of the area under consideration, and include a legible map of the area.

(3) State that the report required in G.S. 160A-47 will be available at the office of the municipal clerk at least 30 days prior to the date of the public hearing.

Such notice shall be given by publication once a week for at least two successive weeks prior to the date of the hearing in a newspaper having general circulation in the municipality and, in addition thereto, if the area to be annexed lies in a county containing less than fifty percent (50%) of the land area of the municipality, in a newspaper having general circulation, in the area of proposed annexation. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall be not less than eight days including Sundays, and the date of the last publication shall be not more than seven days preceding the date of public hearing. If there be no such newspaper, the municipality shall post the notice in at lest five public places within the municipality and at least five public places in the area to be annexed for 30 days prior to the date of public hearing. In addition, notice shall be mailed at lest four weeks prior to date of the hearing by first class mail, postage prepaid to the owners as shown by the tax records of the county of all freehold interests in real property located within the area to be annexed. The person or persons mailing such

notices shall certify to the governing board that fact, and such certificate shall become a part of the record of the annexation proceeding and shall be deemed conclusive in the absence of fraud. If the notice is returned to the city by the postal service by the tenth day before the hearing, a copy of the notice shall be sent by certified mail, return receipt requested, at least seven days before the hearing. Failure to comply with the mailing requirements of this subsection shall not invalidate the annexation unless it is shown that the requirements were not substantially complied with. If the governing board by resolution finds that the tax records are not adequate to identify the owners of some or all of the parcels of real property within the area it may in lieu of the mail procedure as to those parcels where the owners could not be so identified, post the notice at least 30 days prior to the date of public hearing on all buildings on such parcels, and in at least five other places within the area to be annexed. In any case where notices are placed on property, the person placing the notices shall certify that fact to the governing board.

(c) Action Prior to Hearing. – At least 30 days before the date of the public hearing, the governing board shall approve the report provided for in G.S. 160A-47, and shall make it available to the public at the office of the municipal clerk. In addition, the municipality may prepare a summary of the full report for public distribution. In addition, the city shall post in the office of the city clerk, at least 30 days before the public hearing, a legible map of the area to be annexed and a list of persons holding freehold interests in property in the area to be annexed that it has identified.

(d) Public Hearing. – At the public hearing a representative of the municipality shall first make an explanation of the report required in G.S. 160A-47. Following such explanation, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given an opportunity to be heard.

(e) Passage of the Annexation Ordinance. – The municipal governing board shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by G.S. 160A-47 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-47, provided that if the annexation report is amended to show additional subsections of G.S. 160A-48(c) or (d) under which the annexation qualifies that were not listed in the original report, the city must hold an additional public hearing on the annexation not less than 30 nor more than 90 days after the date the report is amended, and notice of such new hearing shall be given at the first public hearing. At any regular or special meeting held no sooner than the tenth day following the public hearing and not later than 90 days following such public hearing, the governing board shall have authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing which meets the requirements of G.S. 160A-48 and which the governing board has concluded should be annexed. The ordinance shall:

(1) Contain specific findings showing that the area to be annexed meets the requirements

of G.S. 160A-48. The external boundaries of the area to be annexed shall be described by metes and bounds. In showing the application of G.S. 160A-48(c) and (d) to the area, the governing board may refer to boundaries set forth on a map of the area and incorporate same by reference as a part of the ordinance.

(2) A statement of the intent of the municipality to provide services to the area being annexed as set forth in the report required by G.S. 160A-47.

(3) A specific finding that on the effective date of annexation the municipality will have funds appropriated in sufficient amount to finance construction of any major trunk water mains and sewer outfalls and such water and sewer lines as required in G.S. 160A-47(3)b found necessary in the report required by G.S. 160A-47 to extend the basic water and/or sewer system of the municipality into the area to be annexed, or that on the effective date of annexation the municipality will have authority to issue bonds in an amount sufficient to finance such construction. If authority to issue such bonds must be secured from the electorate of the municipality prior to the effective date of annexation, then the effective date of annexation shall be no earlier than the day following the statement of the successful result of the bond election.

(4) Fix the effective date for annexation. The effective date of annexation may be fixed for any date not less than 40 days nor more

than 400 days from the date of passage of the ordinance.

(f) Effect of Annexation Ordinance. – From and after the effective date of the annexation ordinance, the territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in such municipality and shall be entitled to the same privileges and benefits as other parts of such municipality. Real and personal property in the newly annexed territory on the January 1 immediately preceding the beginning of the fiscal year in which the annexation becomes effective is subject to municipal taxes as provided in G.S. 160A-58.10. Provided that annexed property which is a part of a sanitary district, which has installed water and sewer lines, paid for by the residents of said district, shall not be subject to that part of the municipal taxes levied for debt services for the first five years after the effective date of annexation. If this proviso should be declared by a court of competent jurisdiction to be in violation of any provision of the federal or State Constitution, the same shall not affect the remaining provisions of this Part. If the effective date of annexation falls between June 1 and June 30, and the effective date of the privilege license tax ordinance of the annexing municipality is June 1, then businesses in the area to be annexed shall be liable for taxes imposed in such ordinances from and after the effective date of annexation.

(g) Simultaneous Annexation Proceedings. – If a municipality is considering the annexation of two or more areas which are all adjacent to the municipal boundary but are not adjacent to one another, it may

undertake simultaneous proceedings under authority of this Part for the annexation of such areas.

(h) Remedies for Failure to Provide Services. – If, not earlier than one year from the effective date of annexation, and not later than 15 months from the effective date of annexation, any person owning property in the annexed territory shall believe that the municipality has not followed through on its service plans adopted under the provisions of G.S. 160A-47(3) and 160A-49(e), for any required service other than water and sewer services such person may apply for a writ of mandamus under the provisions of Article 40, Chapter 1 of the General Statutes. Relief may be granted by the judge of superior court

(1) If the municipality has not provided the services set forth in its plan submitted under the provisions of G.S. 160A-47(3)a on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to the effective date of annexation, and

(2) If at the time the writ is sought such services set forth in the plan submitted under the provisions of G.S. 160A-47(3)a are still being provided on substantially the same basis and in the same manner as on the date of annexation of the municipality.

If, not earlier than 24 months from the effective date of the annexation, and not later than 27 months from the effective date of the annexation, any person owning property in the annexed area can show that the plans submitted under the provisions of G.S. 160A-47(3)c require the

construction of major trunk water mains and sewer outfall lines and if construction has not been completed within two years of the effective date of the annexation, relief may also be granted by the superior court by an order to the municipality to complete such lines and outfalls within a certain time. Similar relief may be granted by the superior court to any owner of property who made a timely request for a water or sewer line, or both, pursuant to G.S. 160A-47(3)b and such lines have not been completed within two years from the effective date of annexation in accordance with applicable city policies and through no fault of the owner, if such owner petitions for such relief not earlier than 24 months following the effective date of annexation and not later than 27 months following the effective date of annexation.

If a writ is issued, costs in the action, including a reasonable attorney's fees for such aggrieved person, shall be charged to the municipality.

(i) No resolution of intent may be adopted under subsection (a) of this section unless the city council (or planning agency created or designated under either G.S. 160A-361 or the charter) has, by resolution adopted at least one year prior to adoption of the resolution of intent, identified the area as being under consideration for annexation; provided, adoption of such resolution of consideration shall not confer prior jurisdiction over the area as to any other city. The area described under the resolution of intent may comprise a smaller area than that identified by the resolution of consideration. The resolution of consideration may have a metes and bounds description or a map and shall remain effective for two years after adoption, and shall be filed with the city clerk.

A new resolution of consideration adopted before expiration of the two-year period for a previously adopted resolution covering the same area shall relate back to the date of the previous resolution.

(j) Subsection (i) of this section shall not apply to the annexation of any area if the resolution of intent describing the area and the ordinance annexing the area both provide that the effective date of the annexation shall be at least one year from the date of passage of the annexation ordinance.

* * *

---

§ 160A-50. Appeal.

(a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within five days after the petition is filed with the court, the person seeking review

shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-47.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms, as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Part, which review date shall preferably be within 30 days following the last day for

receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

(1) That the statutory procedure was not followed, or

(2) That the provisions of G.S. 160A-47 were not met, or

(3) That the provisions of G.S. 160A-48 have not been met.

(g) The court may affirm the action of the governing board without change, or it may

(1) Remand the ordinance to the municipal governing board for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-48 if it finds that the provisions of G.S. 160A-48 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

(3) Remand the report to the municipal governing board for amendment of the plans for providing services to the end that the provisions of G.S. 160A-47 are satisfied.

If any municipality shall fail to take action in accordance with the court's instructions upon remand within three months from receipt of such instructions, the annexation proceeding shall be deemed null and void.

(h) Any party to the review proceedings, including the municipality, may appeal to the Court of Appeals from the final judgment of the superior court under rules of procedure applicable in other civil cases. The superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made and which can be incorporated into the city without regard to any part of the area concerning which an appeal is being made.

(i) If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior court, Court of Appeals or Supreme Court on the effective date of the ordinance, than the ordinance shall be deemed amended to make the effective date with respect to such area the last day of the next full calendar month following the date of the final judgment of the superior court or appellate division, whichever is appropriate, or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand. For the purposes of this subsection, a denial of a petition for rehearing or for discretionary review shall be treated as a final judgement.

(j) If a petition for review is filed under subsection (a) of this section or an appeal is filed under G.S. 160A-49.1(g) or G.S. 160A-49.3(g), and a stay is granted,

then the time periods of two years, 24 months or 27 months provided in G.S. 160A-47(3)c, 160A-49(h), or 160A-49(j) are each extended by the lesser of the length of the stay or one year for that annexation.

(k) The provisions of subsection (i) of this section shall apply to any judicial review authorized in whole or in part by G.S. 160A-49.1(i) or G.S. 160A-49.3(g). (1959, c. 1009, s. 6; 1973, c. 426, s. 74; 1981, c. 682, ss. 20,21; 1983, c. 636, s. 14.1; 1989, c. 598, s. 10.)

Supreme Court, U.S.
FILED
JUL 27 1994
OFFICE OF THE CLERK

No. 93-2072

In The

Supreme Court of the United States

October Term, 1994

BILTMORE SQUARE ASSOCIATES, Et Al.,

Petitioners,

v.

CITY OF ASHEVILLE,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

WILLIAM F. SLAWTER
Counsel of Record
NESBITT & SLAWTER
29 North Market Street
Suite 700
Asheville, North Carolina 28801
(704) 258-2447

SARAH PATTERSON BRISON MELDRUM
City of Asheville
Post Office Box 7148
Asheville, North Carolina 28802
(704) 259-5610

Attorneys for City of Asheville

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners challenging a municipal annexation made pursuant to a state statute have standing to challenge an annexation ordinance on the basis of an alleged violation of the Voting Rights Act of 1965 where the petitioners include five businesses and six individuals, none of whom are members of any racial or ethnic minority nor registered to vote within the municipality.

PARTIES TO THE PROCEEDING

Respondent agrees with petitioners' description of the parties to the proceeding, except that petitioners below included another individual whose name is Brent Williamson. His name is not included as a petitioner in this matter, but there is no notification that this party has no interest in the outcome of the petition.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities iv

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Biltmore Square Associates, et al. v. City of Asheville, 113 N.C. App. 459, 439 S.E.2d 211 (1994), *cert. denied*, 336 N.C. 314, ___ S.E.2d ___ (1994) 6

Garren v. City of Winston-Salem, 463 F.2d 54 (4th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972) 5

Humphries v. City of Jacksonville, 300 N.C. 186, 265 S.E.2d 189 (1980) 5

McNeil v. Springfield Park District, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) 6

Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 38 (1982) 7, 8

Newman v. Voinovich, 789 F.Supp. 1410 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3041 (1993) 6

STATUTES:

N. C. Gen. Stat. sec. 160A-50 1

42 U.S.C. sec. 1973 3

No. 93-2072

In The

Supreme Court of the United States

October Term, 1994

BILTMORE SQUARE ASSOCIATES, Et Al.,

Petitioners,

v.

CITY OF ASHEVILLE,

Respondent.

Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

NOW COMES the City of Asheville, North Carolina, a municipal corporation organized and existing under the laws of the State of North Carolina, by and through the undersigned counsel, and files this Brief in Opposition to the Petition for a Writ of Certiorari to review the judgment of the North Carolina Court of Appeals in this case.

STATEMENT

1. Respondent City of Asheville adopted an annexation ordinance on 4 June 1991, providing for the annexation into the City of Asheville, effective 31 July 1991, of an area within which petitioners herein own property.

Pursuant to N.C. Gen. Stat. sec. 160A-50, petitioners challenged the annexation, which challenge, pursuant to statutory provision, resulted in a stay of the annexation until there was a final judgment in the State appellate system. The trial court (Superior Court Division of the North Carolina General Court of Justice) and the North Carolina Court of Appeals upheld the annexation. The North Carolina Supreme Court denied a Petition for Discretionary Review of this matter. Pursuant to state law, the annexation became effective 30 June 1994.

2. Petitioners herein include two general partnerships which own a shopping mall in the annexation area as a joint venture, with one of the partnerships being an Ohio general partnership and the other being a North Carolina general partnership. The other petitioners include a Pennsylvania Business Trust, with a Delaware corporation as its parent corporation, and a Tennessee corporation, who own department stores and a hotel in the annexation area, and six individual petitioners, all of whom are white. None of the individual petitioners resided, as of adoption of the annexation ordinance, within the corporate limits of the City of Asheville and were not registered to vote in City of Asheville elections.

3. Respondent is not subject to the preclearance requirement of Section 5 of the Voting Rights Act of 1965 (hereinafter the "Voting Rights Act"). See the Appendix to Part 51 of Chapter 1 of Title 28 of the Code of Federal Regulations. Challenges of violations of the Voting Rights Act by respondent must be brought, therefore, under Section 2 of the Voting Rights Act.

4. Section 2 of the Voting Rights Act, codified as 42 U.S.C. sec. 1973, provides protection to those citizens of the United States whose right to vote has been denied or abridged on account of race or color when the political processes leading to nomination or election in a state or political subdivision are not equally open to participation by those citizens, based on the totality of circumstances, so that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice (Pet. App. 29).

5. The trial court found that petitioners include two general partnerships involved in a joint venture, with one of the partnerships being an Ohio general partnership; a Pennsylvania corporation (which petitioners have reported as being merged into a Pennsylvania Business Trust with a Delaware corporation as its parent corporation); a Tennessee corporation; and seven individual petitioners (Pet. App. 14). The trial court further found that all of the individual petitioners are white and that none of the individual petitioners were registered to vote within the City of Asheville at the time of the annexation (Pet. App. 14). The trial court concluded, based upon those findings and the evidence, that petitioners do not have standing in the annexation proceeding to challenge the annexation as violating the Voting Rights Act (Pet. App. 14-15).

6. The North Carolina Court of Appeals found that petitioners failed to show that they were asserting their own legal rights and interests and not those of third parties as none of the petitioners are a member of a racial or ethnic minority and none of the petitioners were registered to vote within the City of Asheville (Pet. App. 7-9).

The North Carolina Court of Appeals further determined that the annexation does not deny or abridge the right to vote on account of petitioners' race or color (Pet. App. 7-9). The North Carolina Court of Appeals decided that the trial court did not err in concluding that petitioners did not have standing to challenge the annexation proceeding as violating the Voting Rights Act (Pet. App. 7-9).

ARGUMENT

1. Section 2 of the Voting Rights Act only provides protection to those citizens of the United States whose right to vote has been denied or abridged on account of race or color when the political processes leading to nomination or election in a state or political subdivision are not equally open to participation by those citizens, based upon the totality of circumstances, so that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Petitioners are not within that protected class. Petitioners Biltmore Square Associates, a North Carolina joint venture; DeBartolo Asheville Associates, an Ohio general partnership; Seven Seas Partnership, a North Carolina general partnership; Crown American Corporation, a Pennsylvania corporation (now merged into Crown American Associates, a Pennsylvania Business Trust, which has as its parent corporation Crown Delaware Holding Company, a Delaware corporation); and Proffitt's Inc., a Tennessee corporation would clearly not have a right to vote and would not have standing to allege a violation of the Voting Rights Act in the annexation proceeding. The individual petitioners

would also not have standing as all of them are white and were not registered to vote in City of Asheville elections as of the time of the annexation.

2.a. In a separate North Carolina annexation case, the North Carolina Supreme Court held that the residents of an annexation area did not have standing to assert that there had been injury to residents of an area which had not been annexed. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980), citing *Warth v. Seldin*, 422 U.S. 490 (1975). The petitioners therein contended that they could present evidence that policy declarations in the North Carolina annexation statutes had not been met in that a small, Black residential area had not been annexed by the City of Jacksonville, North Carolina. In addition to determining that the petitioners therein did not have standing, the North Carolina Supreme Court stated that if there were such a cause of action, it did not lie in a petition to review an annexation ordinance. 300 N.C. at 189, 265 S.E.2d at 191.

b. When residents of an extraterritorial jurisdiction area of the City of Winston-Salem, North Carolina asserted that they were being denied "equal voting rights," the Fourth Circuit Court of Appeals determined that they were not bona fide residents of the city having jurisdiction over that area and had no standing to assert that they were being denied "equal voting rights." *Garren v. City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972). While that case involved a claim brought under Section 1983 of the Civil Rights Act, it should prove instructive in this case.

c. The Seventh Circuit Court of Appeals has previously determined that those ineligible to vote have not experienced a dilution of their vote and are not parties to a Section 2 claim under the Voting Rights Act. *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). The issue in *McNeil* was whether or not one counts total minority population or only those of voting age when examining an alleged violation of Section 2 of the Voting Rights Act. The Seventh Circuit Court of Appeals determined that only minorities of voting age could be parties to a Section 2 claim. 851 F.2d at 945. As petitioners in this annexation matter were not registered voters within the City of Asheville as of the time of annexation, they could not be parties to a Section 2 claim under the Voting Rights Act in a challenge to the annexation proceeding.

d. In its opinion, the North Carolina Court of Appeals cited a federal case which sets forth the test to establish standing in a challenge brought under the Voting Rights Act. *Newman v. Voinovich*, 789 F.Supp. 1410 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3041 (1993), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The *Valley Forge* test consists of a six-prong analysis and, in order to have standing, a party must meet all of the six prongs of the test. In this case, petitioners fail to meet at least the part of the test which requires that the plaintiff must assert his own legal rights and interests, not those of a third party. *Biltmore Square Associates, et al. v. City of Asheville*, 113 N.C. App. 459, 439 S.E.2d 211 (1994), *cert. denied*, 336 N.C.

314, ___ S.E.2d ___ (1994). Respondent respectfully contends that the individual petitioners would also fail under a separate prong which requires that the injury be redressed by the requested relief and that the business petitioners would fail to qualify under all or most of the six prongs.

3. Petitioners cite *Moore v. Swinson*, 58 N.C. App. 714, 294 S.E.2d 381 (1982) for the proposition that they can be deprived of their voting rights in all future City of Asheville elections if the area in which they own property is annexed. That case does not apply in this situation. It involved the City of Washington, North Carolina, which is subject to the preclearance requirements found in Section 5 of the Voting Rights Act. The City of Asheville, North Carolina, is not subject to those preclearance requirements.

In the City of Washington case, the plaintiffs therein sought the right to vote in a sewer bond referendum held after the effective date of the annexation, but before the annexation was precleared by the United States Attorney General. The North Carolina Court of Appeals only held that those residents would be precluded from voting in that specific election as the annexation had not yet been precleared. The North Carolina Court of Appeals did *not* hold that those residents could *never* vote in a future City of Washington election, as petitioners would contend, but would only be precluded from voting in the sewer bond referendum as the annexation had not been precleared prior to the date of the referendum. 58 N.C. App. at 718-719, 294 S.E.2d at 383. The North Carolina Court of Appeals also noted that the plaintiffs in *Moore* did not suffer abridgment of a fundamental right or injury by

their exclusion as voters from that particular and singular election. 58 N.C. App. at 719, 294 S.E.2d at 384.

4. Even if appropriate plaintiffs bring a successful challenge to show that the City of Asheville, somehow, is violating Section 2 of the Voting Rights Act, which the City of Asheville respectfully denies, the individual petitioners herein would not be forever deprived of the right to vote. In fact, if the City of Asheville were violating Section 2 of the Voting Rights Act, all of the registered voters within the City of Asheville would be subjected to the same remedy as the residents of this annexation area. In that event, neither these petitioners nor registered voters of the City of Asheville would be precluded from voting in *all future* City of Asheville elections once the violation had been remedied. Respondent is at a loss to determine how petitioners might somehow lose their right to vote in all future City of Asheville elections after the annexation has become effective. The North Carolina Court of Appeals correctly determined that these petitioners did not have standing to challenge this annexation based upon an alleged violation of Section 2 of the Voting Rights Act.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

NESBITT & SLAWTER

WILLIAM F. SLAWTER
Counsel for Respondent
29 N. Market Street
Suite 700
Asheville, North Carolina 28801
(704) 258-2447

CITY OF ASHEVILLE

SARAH PATTERSON BRISON MELDRUM
Counsel for Respondent
Post Office Box 7148
Asheville, North Carolina 28802
(704) 259-5610

July 1994